IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN AT JODHPUR.

JUDGMENT

L.Rs. of late Shri Bhagwan & anr. vs. Jawan Singh & ors.

S.B.Civil Second Appeal No.136/1982 under Section 100,C.P.C. against the judgment and decree dated 9.9.1982 passed by the Addl. District Judge, Rajsamand in Civil Appeal No.62/1981.

Date of judgment: January 04, 2006.

PRESENT

HON'BLE MR. PRAKASH TATIA,J.

Mr. G.Vaishnav) for the appellants.
Mr. R. Chouhan)

Mr. Rajendra Mehta for the respondents.

BY THE COURT:

Heard learned counsel for the parties.

According to the plaintiff, the suit property was sold by defendant no.4 Rod Singh, father of the plaintiff to defendant no.3 Girdhari Singh by registered sale-deed dated 13.4.1973. The plaintiff, son of defendant no.4, purchased the said plot from defendant no.3 by registered sale-deed dated 1.9.1975. The plaintiff in his plaint pleaded that defendant no.3, after purchasing the plot from defendant no.4, went on the site on 29.4.1973 for raising constructions but defendants no.1 and 2 did not permit defendant no.3 to enter in the plot.

Defendant no.3, therefore, filed suit for permanent injunction which was registered as Civil Original Suit No.98/73. This suit was filed on 5.5.1973 , only a few days after purchase of the plot by defendant no.3.The suit was withdrawn by defendant no.3 with leave of the court for filing a fresh suit. Since the plot in question was already sold by defendant no.3 to plaintiff on 1.9.1975 before withdrawing the suit no.98/73, therefore, it appears that present suit has been filed by the plaintiff purchaser from defendant no.3. The plaintiff pleaded that the plaintiff is owner of the plot in dispute and is entitled to decree for declaration that he is owner of the plot in dispute and since defendants no. 1 and 2 encroached upon the plot on 29.4.1973, therefore, the plaintiff is entitled to decree for possession and mesne profit at the rate of Rs.15/- per month against defendants no.1 and 2. This suit was instituted on 10.10.1976.

The defendants no.1 and 2 submitted written statement denying the plaint allegation, stated that the suit property was never belonging to defendant no.4 Rod Singh nor he had a right to sell the plot to any body. Defendant no.3 Girdhari Singh filed the suit for injunction in which his injunction application was dismissed and thereafter he executed the sale deed in favour of the plaintiff. According to the defendants, all that has been done to grab the possession of the plot in

dispute from defendants no.1 and 2 and the suit has been filed by the plaintiff in collusion with defendants no.3 and 4. Defendants no.1 and 2 claimed that they are in possession since their ancestors to which more than 50 years have already passed. The defendant no.3 submitted written statement and admitted the case of the plaintiff. Defendant no.4 submitted written statement admitting the case of his son plaintiff and defendant no.4 pleaded that the suit property was in possession of defendant no.4 and before that it was in possession of defendant no.4's father.

Several issues were framed by the trial court on the basis of pleadings of the parties and after trial, the trial court dismissed the suit of the plaintiff for declaration of title but decreed the suit of the plaintiff for possession after holding that defendants failed to prove that they were in possession since last 12 years, therefore, they could not prove their adverse possession over the property in dispute. Though the suit for declaration was dismissed but since decree for possession was granted in favour of the plaintiff and against defendants no.1 and 2, therefore, defendants no.1 and 2 preferred appeal against the judgment and decree of the trial court dated 21.7.1979. The plaintiff also submitted cross-objection against the dismissal of the suit by the trial court so far as decree for declaration is concerned. The first

appellate court dismissed the appeal of defendants no.1 and 2 as well as the cross-objections filed by the plaintiff by the judgment and decree dated 9.9.1982. Hence this second appeal.

Second appeal was admitted by this Court on 8.11.1982 after framing the following substantial questions of law:-

> *"1. Whether document Ex.3 is sufficient to prove the title of the plaintiff in respect of the disputed plot of land ?*
>
> *2. Whether the recital in the order Ex.5 about the admission of Bhagga, defendant-appellant No.1 is admissible in evidence?"*

The learned counsel for the appellant vehemently submitted that by document Ex.3, the title of the plaintiff has not been proved in any manner. It is also submitted that Ex.3 cannot be said to be a *Patta* for the land in question or a document conveying valid title in favour of the plaintiff or even in favour of his father. It is also stated that the document appears to be forged one because of the simple reason that earlier defendant no.4, father of the plaintiff, himself in his statement in proceedings in court admitted on oath that Patta of the property is not there. It is also submitted that how this Patta saw the light of the day, has not been explained. It is also submitted that the plaintiff neither pleaded any fact about Ex.3 nor he has stated that document

Ex.3 is relating to the property in dispute. It is also submitted that the Patta is not in the name of any of the persons, either plaintiff or his father or his fore-father. The learned counsel for the appellants also submitted that the courts below committed serious error of law in relying upon the order-sheet Ex.5 and any fact mentioned in the order-sheet cannot be taken as admission of defendant-Bhagga. According to the learned counsel for the appellant, the two courts below drawn wrong inference from the facts available on record. The defendant seriously disputed the facts mentioned in the order-sheet Ex.5 but that was accepted by the courts below and what defendant no.4 stated on oath before the court of law in his statement on oath, has been ignored and the court held that explanation for non-production of document (Ex.3) is sufficient explanation.

The learned counsel for the respondent vehemently submitted that the plaintiff clearly stated that the property was originally belonging to Rod Singh, his father and Rod Singh in his statement stated that he was the owner of the disputed property and before him, his ancestors were owners. The defendants themselves submitted before the competent authority that they purchased the property in dispute from Moti Singh who is father of Rod Singh, therefore, defendants no.1 and 2 cannot question the plaintiff's ancestors' title to property.

According to the learned counsel for the respondent, the plaintiff and defendant no.4 both are estopped from taking such a plea. The learned counsel for the respondents also submitted that the two courts below very categorically considered the facts of the case and thereafter rejected all the objections raised by defendants no.1 and 2 and recorded the finding of fact that the document Ex.3 is in relation to the property in dispute and defendants no.1 and 2 admitted plaintiff and defendant no.4's ancestors to be the owners of the property and, therefore, the finding is based on evidence and not vitiated by any reason. It is also submitted that Ex.5 is the order-sheet and the fact recorded in the order-sheet by the competent authority cannot be disputed in different proceedings like in this suit. The learned counsel for the respondents also submitted that defendant no.4 in his statement clearly stated that the property in dispute is his ancestral property and the two courts below relied upon this statement of defendant no.4 and held that the property was belonging to the plaintiff and before that it was of defendant no.4's ancestors, therefore, the courts below rightly decreed the suit of the plaintiff. So far as dismissal of the suit for declaration is concerned, according to the learned counsel for the respondent, the finding on issue nos.1 and 2 has been recorded in favour of the plaintiff-respondent and thereby the two courts below held that the plaintiff is owner of the property and the suit was dismissed only on

the ground that the suit has been filed after expiry of the period of limitation.

I considered the submissions of the learned counsel for the parties and perused the record and also perused the statements of the witnesses as well as the documents Ex.3 and Ex.5.

It will be worthwhile to mention here that in document Ex.3, there is no mention of name of the plaintiff or his father defendant no.4. In the plaint or in the written statement filed by defendant no.4, it is not mentioned that who was the grand-father of defendant no.4. Even in the statements of the plaintiff or defendant, it has not come what was the name of the grand-father of defendant no.4 Rod Singh. Therefore, basic fact to connect the plaintiff and defendant no.4 with the Patta is missing, so far as the document Ex.3 is concerned and if Ex.3 is accepted as a document conveying title even then the plaintiff failed in proving that by document Ex.3 the plaintiff or their predecessors became owners of the disputed property. Apart from it, the two courts below very lightly ignored all the circumstances which were relevant for the purpose of examining the nature of the document Ex.3. The plaintiff and defendant no.4's words of mouth were taken as gospel truth despite the fact that defendant no.4 himself could not

explain his earlier admission made on oath in judicial proceedings where he has stated that he has no Patta of the land in question. Apart from it, even if Patta was lost or it was not found by defendant no.2 at the time when he sold the land to defendant no.3 in the year 1973, even then this fact could have been mentioned in the sale-deed that there was Patta in favour of defendant no.4's ancestors but it is lost or it is not traceable. It is admitted case of the plaintiff and defendant no.4 both that when plaintiff purchased the plot from Girdhari (defendant no.3), neither defendant no.4 nor Girdhari were in possession of the plot. The courts below also failed to notice that defendant no.3 himself filed suit for permanent injunction after purchasing the plot within few days from the execution of the sale-deed and he was not allowed to enter in the plot by defendants no.1 and 2, therefore, defendant no.3 failed in proving his possession over the plot and despite pendency of the litigation initiated by Girdhari(defendant no.3) and despite dismissal of his injunction application, during pendency of the suit, the suit property was purchased again by none else than son of defendant no.4 himself. Girdhari himself withdrawn his suit with liberty to file fresh suit, then the suit could have been filed on the basis of the title only and in the entire plaint, the plaintiff never set up his case on the basis document Ex.3. He only referred about the sale-deed executed by his father defendant no.4 in favour of defendant no.3 and sale-deed executed by

said defendant no.3 in favour of the plaintiff. It is strange that two courts below after dismissal of the suit for declaration of title, decreed the suit for possession in favour of the plaintiff, against defendants no.1 and 2, who were admittedly in possession of the suit property not only from before the present suit was instituted by the plaintiff but was in possession when defendant no.3 purchased the suit property from plaintiff's father defendant no.4. Under what right the plaintiff could have claimed relief of possession when they lost their suit for declaration of title, is also remained unexplained in both the judgments. The possession of the property can be claimed under the provisions of Section 145,Cr.P.C. within two months from the illegal dis-possession and within six months under the Specific Relief Act without proving title but in regular suit on the basis of title, the plaintiff can ask for decree only on the basis of his title. The document Ex.3, as held above, is not a title deed in favour of the plaintiff or his predecessors and the suit for declaration of title has been dismissed by the two courts below and the courts below committed serious error of law in holding that Ex.3 is the title deed of the property in dispute and is in favour of the plaintiff's ancestors. The substantial questionno.1 is, therefore, decided in favour of the appellant.

So far as recital in the order Ex.5 is concerned, this cannot be

treated to be an admission admitting the title of defendant no.4 or plaintiff for the property in dispute. The said admission is in a proceeding where permission to raise construction was sought from the Municipal Board, Nathdwara. If this order-sheet dated 9.7.1973 (Ex.5) is read completely then it is recorded in the order-sheet that Girdhari and Bhagga have been shown to have stated that the land for which Girdhari sought permission to raise construction was purchased by them from Moti Singh s/o Bheem Singh, 15 years ago and they submitted the application for construction of house but permission was not granted for want of Patta. This statement also supports the plea of the defendants that they were in possession of the land in dispute since long and during the pendency of the suit Girdhari sought construction permission before the Municipal Board only. In view of the above, the recital in the order Ex.5 cannot be treated to be an admission of one of the defendants Bhagga that Moti Singh was owner of the property in dispute particularly in the light of the defendant's statement on oath before the trial court that he never made this statement before the Municipal authorities.

I also considered the reasons given by the two courts below for holding that the plaintiff proved that the suit property was ancestral property of defendant no.4. It appears that the two courts below totally swayed by Ex.3 alone and failed to read Ex.3 and accepted the persons

named in Ex.3 as ancestors of the plaintiff and defendant no.4, for which neither there is pleading nor there is evidence that the persons named in Ex.3 are the ancestors of the plaintiff and defendant no.4.

In view of the above discussion, this appeal deserves to be allowed and hence allowed and the judgment and decree passed by both the two courts below dated 9.9.1982 and 21.7.1979 are set aside. The suit of the plaintiff is dismissed. No order as to costs.

(PRAKASH TATIA),J.

mlt.